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No. 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLEES

EMMET A. BLAES,
HARRY L. HOBSON,
500 Farmers & Bankers Life Bldg.,
Wichita, Kansas,
Attorneys for Appellees.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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OPINIONS BELOW

No opinion was rendered by the District Court of Edwards County, Kansas. The opinion of the Supreme Court of Kansas (R. 39-55) is reported at 185 Kan. 274, 341 P.2d 1002.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered on July 10, 1959 (R. 39). The notice of appeal to this Court was filed on October 6, 1959 (R. 61) and probable jurisdiction was noted on February 23, 1960 (R. 62). Appellant asserts that the jurisdiction of this Court is founded on 28 U.S.C. 1257 (2) in that the case involves the judgment of the highest court of a state in a case where the validity of a state statute was drawn in question as being repugnant to a law of the United States and the decision was in favor of its validity. Appellees concede that the United States argued before the Supreme Court of the State of Kansas that there existed a conflict between a federal and a state statute and appellees further concede that the Supreme Court of Kansas decided in favor of the validity of the state statute.

STATUTES INVOLVED

The pertinent statutes are set forth in the appendix to the Brief of the United States at pp. 33-42.

QUESTION PRESENTED

Whether 28 U.S.C. 2410(c) grants the United States, as the second mortgagee of real estate judicially foreclosed and sold in a suit in which the United States was afforded all the relief it sought but failed to protect its interest by bidding at the foreclosure sale, the right to redeem within one year from the date of sale when by state statute the mortgagor has the exclusive right to redeem during that period.

STATEMENT

The statement of the case set forth in the Brief of the United States (pp. 2-7) sufficiently states the factual background of this matter. However, the Court should not be left with the impression that the affirmative relief sought by the United States on three promissory notes here involved had any relationship to the initial action brought by the John Hancock Mutual Life Insurance Company for foreclosure of its mortgage. The United States held no security for the three notes and though it prayed that the total amount of its claim be adjudged a lien on the real property involved, the court failed to so decree (R. 23).

SUMMARY OF ARGUMENT

The United States was summoned into court pursuant to 28 U.S.C. 2410 by the John Hancock Mutual Life Insurance Company. If a condition on the appearance of the United States in the foreclosure action was acknowledgment of a one year period of redemption for the United States following the foreclosure sale, such condition was waived when the United States stepped from its role as a party-defendant and sought affirmative relief against a codefendant. The United States, when seeking affirmative relief in a state court, is subjected to the same rules and procedures as any private litigant. Among the rules to which the Government acquiesced by its prayer for relief in the Kansas courts is that statutory provision which gives the defendant-mortgagor the exclusive right to redeem for the first twelve months following a foreclosure sale.

The foreclosure sale was held, in accordance with the decree of the District Court of Edwards County, Kansas, to satisfy the liens of both the first mortgagor and the United States. The one year redemption period granted the United States in 28 U.S.C. 2410(c) applies, if at all, when a sale is held solely to "satisfy a lien prior to that of the United States." Since the proceeds of the sale in this case were to be paid first to the first mortgagor and then, in accordance with its prayer, to the United States, the sale was held to satisfy not only a prior lien but the lien of the United States as well, and the redemption provision has no application.

The statute, 28 U.S.C. 2410(c), provides that a judicial foreclosure sale shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as is provided with respect to such matters by local law. Local law in Kansas requires the lienholder to appear and bid at the sale to assure protection of a junior lien. Though the United States was authorized, both by its mortgage instrument and 7 U.S.C. 1025 to bid at the sale it failed to do so. Therefore, the effect of the sale by local law was to discharge the property from all junior encumbrances, including the lien of the United States. The subsequent redemption by the mortgagors, during the period of their exclusive right to redeem, made the discharge complete and the United States is now without an interest in the real property.

Property rights and interests in property are matters to be determined exclusively by state law. The Congress is without authority to interfere with property relationships within the boundaries of a sovereign state. The laws of Kansas, both statutory and decisional, determine property relationships in that state. When the first mortgage attached to the property here involved certain rights ac-

crued to the mortgagee by Kansas law. Among those rights was the exclusive right to redeem during the first twelve months following a foreclosure sale. Such right cannot be waived by the mortgagee. The Congress is without authority to take this right from a Kansas landowner and consequently the decision of the Supreme Court of Kansas should be affirmed.

ARGUMENT

I.

The United States, by Seeking Affirmative Relief in the Courts of Kansas, Subjected Itself to the Rules and Procedures of Kansas Law and Waived Any Conditions Imposed on Its Appearance Pursuant to 28 U.S.C. 2410.

The thrust of the argument of the United States is premised on the proposition that the third sentence of 28 U.S.C. 2410(c), the one year right to redeem, imposes a condition upon the waiver of sovereign immunity by the United States. The Government has argued what, of course, is conceded, that the United States cannot be sued without its consent. It is further conceded that service of process in this action was accomplished on the Government in accordance with the procedures provided in 28 U.S.C. 2410(c). It is likewise conceded that under Kansas law the United States was a necessary party to the foreclosure suit if its lien was to be extinguished. *Motor Equipment Co. v. Winters*, 146 Kan. 127, 69 P.2d 23.

Even if it were conceded, and it is not, that the one year right of redemption is a "protective condition" on the appearance of the United States in a foreclosure suit, the character of the appearance of the Government in the lawsuit in the District Court of Edwards County, Kansas,

changed when the United States, having waived its immunity, chose to file a cross petition seeking affirmative relief against a codefendant rather than simply filing an answer. When the United States appeared in the Kansas court it did so not so much as a defendant junior lienor hailed into court pursuant to 28 U.S.C. 2410, but as a party plaintiff seeking relief against the defendant mortgagors. It should be borne in mind that it was not the defendant mortgagors, the appellees here, who summoned the United States into the law suit. It was not the defendant mortgagors for whom the Government waived its immunity. It was the defendant mortgagors, however, against whom relief was sought by the United States. The relationship then became one in the nature of plaintiff-defendant when the cross petition was filed, with the United States as plaintiff and the mortgagors as defendants. A delineation was even made in the pleading filed by the Government between its answer and cross petition, the cross petition relating solely to relief against the defendant mortgagors (R. 11-13). It is for this reason that the appellees argue that the character of the appearance of the Government changed when the cross petition was filed and any condition on its appearance in the state court action was waived.

Though the United States did hold one note from the defendant mortgagors secured by a second mortgage on the property foreclosed in the state action (R. 22), it held three additional notes for which it had no security. The United States was not satisfied to seek a foreclosure of its second mortgage, per its authority in 28 U.S.C. 2410(c), but rather sought, like a party plaintiff, the assistance of the courts of the State of Kansas to secure judgment against the defendant mortgagors on the three additional notes (R. 13). When it sought those judgments it was

seeking affirmative relief and it thereby subjected itself to the rules and procedures imposed by the statutes and the courts of the State of Kansas. This Court has often said that the sovereign is no different from any other party when it seeks relief in foreign courts.

> "By voluntarily appearing in the role of suitor it [the sovereign] abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134.

See also *United States* v. *Martin*, 267 F.2d 764 (10th Cir.). And "Where a sovereign voluntarily litigates, he must play the role of a litigant like any other suitor and abide by the consequences." *United States* v. *National City Bank*, 83 F.2d 236, 238 (2d Cir.); cf. *United States* v. *Maryland Cas. Co.*, 235 F.2d 50, 53 (5th Cir.).

In *United States* v. *The Thekla*, 266 U.S. 328, this Court made reference to the role of the United States in a suit in which it sought affirmative relief. The Court said:

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it.
>
> * * *
>
> "* * * it is reasonable for the Court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States * * *. It joined in the suit, and that carried with it the acceptance of what-

ever liability the courts may decide to be reasonably incident to that act." *Id.* at 339-41.

Though *The Thekla* was a suit in admiralty and consequently distinguishable, the quoted language was repeated in a non-admiralty suit by this Court in *American Propeller & Manufacturing Co.* v. *United States*, 300 U.S. 475. There, in an action against the United States, the Government counterclaimed for an amount in excess of the petitioner's claim. Again the Court placed the United States in the position of a private suitor to the end that justice could be done.

The United States voluntarily chose the forum in which to seek judgment on its three notes. It could have sued elsewhere or refrained from suing. Since it chose neither of these alternatives, it consented that the Kansas court should determine all matters in issue in accordance with the rules of law applicable to like controversies arising between private litigants. *United States* v. *Moscow-Idaho Seed Co.*, 92 F.2d 170 (9th Cir.). See also, *Mountain Copper Co.* v. *United States*, 142 Fed. 625 (9th Cir.), where the court said:

> "It is the well-established law that, when the government comes into a court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less." *Id.* at 629.

The legislative and decisional trend is toward relaxation of governmental immunity. See, *e. g.*, *National City Bank* v. *Republic of China*, 348 U.S. 356; *United States* v. *Yellow Cab Co.*, 340 U.S. 543. This being true, and the Government having provided a basis for the relaxation of the rule in this case by assuming the role of a party plaintiff, the Kansas Supreme Court determination should be affirmed. The Government should be required to ac-

cept its role as a party plaintiff and the attendant consequences the same as any other litigant.

II.

Where a Foreclosure Sale Is Held to Satisfy Not Only a Prior Lien but the Lien of the United States As Well, It Is Reasonable to Argue That the Redemption Provision of 28 U.S.C. 2410(c) Has No Application.

There is some question whether the redemption provision in the third sentence of subsection (c) of 28 U.S.C. 2410 has any application under the circumstances here. The provision applies solely "where a sale is made to satisfy a lien prior to that of the United States." If, then, the sale was made to satisfy other liens the redemption provision perhaps has no application. Pursuant to the prayer in the cross petition by the United States (R. 13), the sale of the real estate was made not only to satisfy a prior lien but to satisfy the lien of the United States as well (R. 24). It was the order of the District Court of Edwards County, Kansas, that the real estate be sold and the proceeds be applied as follows:

"First: to the payment of the costs of this action, and of said sale;

Second: to the payment of all taxes which are a lien and payable on said premises at the time of said sale;

Third: to the payment of the first lien in favor of the plaintiff, John Hancock Mutual Life Insurance Company, a corporation;

Fourth: to the payment of the second lien in favor of the defendant, The United States of America, and costs;

Fifth: the balance, if any, to be paid to the person or persons entitled thereto under the direction of the court; together with accumulated interest on the liens to date of sale; * * *" (R. 24).

The sale was not held solely for the benefit of the John Hancock Mutual Life Insurance Company, the plaintiff and holder of the first mortgage, but was also held for the benefit of the United States. Thus, if the redemption provision applies *only* where a sale is conducted to satisfy a prior lien, it has no application here.

The direction for the payment of the proceeds from the sale by the District Court was in accordance with the whole statutory scheme of mortgage foreclosures in Kansas and was premised on the necessity of an appearance at the sale rather than dependence on a right of redemption by any party wishing to protect its lien. See *Moore* v. *McPherson,* 106 Kan. 268, 187 Pac. 884. The Government says the fact that the sale was made for the purpose of satisfying the federal lien as well as the first mortgage is "immaterial." (Brief for U.S. in Opposition to Motion to Dismiss or Affirm, p. 6, n. 9). That fact is not immaterial in light of the Kansas statute permitting but one sale to satisfy the lien. See *Frazier* v. *Ford,* 138 Kan. 661, 27 P.2d 267. See also the journal entry of judgment of the District Court of Edwards County, Kansas (R. 25). The Government argues that the fact that the insurance company bought the property at the foreclosure sale at a price sufficient only to satisfy its own lien indicates that the sale was made to satisfy only the lien of the insurance company. The reason the property sold for an amount insufficient to satisfy the government's lien is the fact that the Government failed to appear, as required by the laws of the State of Kansas, at the sale to bid in the property if it wished to protect whatever

interest it might have in the property. *Moore* v. *McPherson,* 106 Kan. 268, 187 Pac. 884; *Sigler* v. *Phares,* 105 Kan. 116, 181 Pac. 688. It is perhaps unfortunate that some magnanimous soul did not appear at the sale and bid an amount sufficient to pay off all lienholders but in the absence of such a person at the sale the lienholder himself must bid if he wishes protection.

It should be noted that the sworn affidavit supporting the "motion for certificate of redemption" filed by the State Director of the Farmers' Home Administration for Kansas includes the erroneous statement that the judgments awarded the Farmers' Home Administration were "adjudged to be second liens on the real estate which was the subject of said action" (R. 28). The only judgment decreed to be a lien was the judgment on the note secured by the mortgage on the real estate here in controversy (R. 23).

It should further be noted that the United States did not actually seek a foreclosure of its lien but rather prayed only that "in the event the Court shall enter an order providing for the judicial sale of the * * * real estate" the balance of the proceeds after payment to the first lienholder be paid to it. Such careless pleading could have resulted in a waiver of the lien held by the United States. The lien of a junior mortgagee is waived in Kansas by failure to have the lien foreclosed in a foreclosure proceeding instituted by the first mortgagee. *Federal Land Bank* v. *Shoemaker,* 155 Kan. 501, 126 P.2d 205; *Moore* v. *McPherson,* 106 Kan. 268, 187 Pac. 884.

Since the foreclosure sale was held to satisfy the lien of the United States as well as the first lien and since the Kansas court could have declared the lien of the United States waived, the United States has no redemption privi-

lege under 28 U.S.C. 2410(c) and the decision of the Supreme Court of Kansas should be affirmed.

III.

The Effects of a Judicial Sale Are Determined by Local Law and Since, by the Laws of Kansas, the Lien of a Junior Lienholder Can Be Fully Protected Only by Bidding at the Sale, the United States Has Lost Its Lien by Its Failure to Appear and Bid and Its Alleged Right of Redemption Is Ineffective to Protect Its Property Interest.

The first sentence of subsection (c) of 28 U.S.C. 2410 provides that:

> "A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated."

When that section is read literally and alone, a summary affirmance of the decision of the Kansas Supreme Court is required. It is only when it is read in conjunction with the third sentence of the subsection that any doubt as to its meaning is cast. That doubt is erased by consideration of the legislative history of the entire section as will be demonstrated, *ilnfra*, pp. 14-17.

There is no question that by the "local law" of Kansas (which includes both statutory and decisional law, *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64) the property in question has been discharged from the encumbrance held by the United States by the judicial sale of that property and the subsequent redemption by the mortgagor. As has been held so many times by the Supreme Court of

the State of Kansas, it was incumbent upon the United States to appear at the sale and bid for the protection of its lien. See, e. g., *McFall* v. *Ford*, 133 Kan. 593, 1 P.2d 273, in which the court said:

> "The law gave her a lien. She was bound to know her lien was an inferior lien, subject to discharge by a sale under the superior lien, and she was required to be diligent in watching the proceedings to enforce the superior lien if she desired to protect her own * * *. She had the right to bid at the sale, and so protect her lien. She had the right to participate in distribution of surplus on application if the land sold for more than the first lien. She had the right to redeem, subject to the landowner's preemptive right." *Id.* at 608, 1 P.2d at 280.

See also *Frazier* v. *Ford*, 138 Kan. 661, 27 P.2d 267.

If a judicial sale, then, is to have the "same effect respecting the discharge of property from liens and encumbrances held by the United States", as is provided by "local law," the lien of the United States on Kansas property has been discharged by its failure to bid at the sale and the redemption by the mortgagor. Cf. *Custer* v. *McCutcheon*, 283 U.S. 514.

The United States could have purchased at the foreclosure sale to protect its interest in accordance with the terms of the mortgage itself (R. 38). Furthermore, there is specific authorization for bid and purchase by the United States at a foreclosure sale under the circumstances of this case. 7 U.S.C. 1025 provides that:

> "The Secretary [of Agriculture] is authorized and empowered to make advances to preserve and protect the security for, or the lien or priority of the lien securing, any loan or other indebtedness owing to, insured by or acquired by the Secretary under any

> programs administered by the Farmers' Home Administration; *to bid for and purchase at any foreclosure or other sale* or otherwise acquire property pledged, mortgaged, conveyed, attached or levied upon to secure the payment of any such indebtedness * * *." (Emphasis added).

This statute, in this form, became effective August 1, 1956, so that it was in effect at the time of the foreclosure sale in Edwards County, Kansas. The loan and mortgage were under a program "administered by the Farmers' Home Administration" and consequently the statute has application here. Thus, the United States had within its power a means to assure the protection of its interest in the land. It could have complied with state law and avoided the legal problem it here attempts to establish if it had wished to do so. The Government has admitted that federal law should take precedence over state law, if at all, only to the extent necessary for the effectuation of federally-created rights. (Brief of Appellant, p. 30). The federally-created right to protect the interest of the United States in the property could be effectuated here without a declaration of invalidity of any state procedure. There was nothing to prohibit the Government from applying its federally-created right to bid at the sale and protect its interest. No hardship is worked on the Government by application of the state procedure.

The legislative history of Section 2410(c) of Title 28 of the United States Code does not aid the appellant in its argument. It is obvious, both from the portions of the legislative history cited by the appellant and from the remainder of the history as found in the Congressional Record and the Committee Reports that the purpose of the statute was to enable private lienors to join the United States as a party to clear the record on encumbered real

estate. In addition to the comments from the legislative history quoted by the United States in its brief the following statement made on the floor of the House on *H.R. 980, 71st Cong.*, 2d Sess., is significant. Mr. Graham:

> "* * * this bill was reported not for the purpose of subordinating any liens of the Government to any other lien but because real estate is fettered now throughout the country in such a way that there is a clamor for relief.
>
> "Every building association and every title and trust company that passes on titles is calling for an amendment that will enable the owner of a piece of real estate to unfetter it from the lien which the Government might have on it, and it applies only to those cases where there is a lien on the property acquired before the Government's lien attached. It only provides a method by which the Government can be made a party and that lien disposed of by a judicial sale, in the same manner in which liens are disposed of in every State, and ought to be in every Federal court throughout the land." 72 *Cong. Rec.* 1998.

Though these remarks pertained to H.R. 980 in an earlier form than that in which it was finally passed, they nevertheless indicate the general purpose for which the legislation was enacted and give a clue as to what Congress specifically intended. The statute was designed to eliminate the "unfair disadvantage" to which private lienors had been subjected "because of inability to join effectively the Government as a party to judicial proceedings." *United States* v. *Brosnan*, 363 U.S. at 248. And the effect to be given a judicial sale in accordance with the expression of intent was to dispose of liens in the same manner in which liens are disposed of by state law.

The reference to a right of redemption was made in the statute because the United States had no authority to

purchase at a foreclosure sale at the time the statute was written and it therefore had no other means of protection. 74 *Cong. Rec.* 6208. There had earlier been a provision in the statute for delaying the sale until the end of the session of Congress following the foreclosure judgment, thus permitting the Government to obtain a Congressional appropriation to bid at the sale. See *S. Rept. No. 351, 71st Cong., 2d Sess.*, pp. 1-2; 72 *Cong. Rec.* 7020. This provision was stricken in favor of the redemption right in order that the United States would have a means of protecting itself in those states where a redemption right did not otherwise exist. There is nothing in the legislative history to indicate any other intention, What comfort the United States finds for its position in the following excerpt from the Conference Committee Report in *H. Rept. No. 2722, 71st Cong., 3d Sess.*, p. 4, remains a mystery to appellees:

> "In many States of the Union there are now laws allowing junior lien holders as well as fee owners a year in which to redeem from execution and foreclosure sale of real estate. It is true that in other States no such equity of redemption exists. However, the provision adds nothing to the present difficulties in States which allow no redemption period, as under present conditions where present lien holders can not sue the United States, the rights of the United States never are barred by foreclosure decree."

If this statement is of any help at all, it seems to appellees to demonstrate that Congress was concerned with those states where no redemption period was allowed junior leinholders. It was the purpose of Congress, then, to provide a redemption right in those states. There is no indication of an intent to grant the United States a lesser right than that provided by state law. In Kansas the United States had not twelve months but fifteen months

in which to redeem subject of course to the preemptive right of the landowner mortgagor. *G.S. Kan. 1949,* 60-3440. Moreover, as already noted, both by statute and by the terms of the mortgage itself, the Government could have bid in the property at the foreclosure sale and protected its interest in that manner. There is no evidence that any conflict with existing state statutes was anticipated or that there was any intention to supersede an existing right created by state statute in a mortgagor.

The argument of the United States that the one year redemption period is a condition imposed on the waiver of sovereign immunity for the "protection" of the United States loses much of its force when the Government refuses to argue that this one year period is exclusive with the Government. And, *a fortiori* when the Government *emphasizes* its refusal to so argue (Appellant's Brief, p. 12). In fact, the Government argues that its right is "coexistent" with that of the landowner-mortgagor (Appellant's Brief, p. 30). If that be so, and if the landowner-mortgagor redeems first, then the United States loses, by its inaction, its lien and all of its interest in the property. *Sigler* v. *Phares,* 105 Kan. 116, 181 Pac. 688. The United States admits as much when it says "redemption by the mortgagor cuts off the redemption rights of junior lienholders." (Appellant's Brief, p. 13). The "protection" the United States claims Congress intended by enacting the "proviso" is not afforded by that "proviso" if the Government maintains its "coexistent" rights position.

It seems far more reasonable to read the legislative history for what it says—the purpose of 28 U.S.C. 2410 was to enable lienors to clear title to property encumbered by junior government liens. General recognition of the validity and effect of state laws was given. The United States was granted a year in which to redeem when

such redemption right or superior protection by state law was not otherwise afforded.

The United States is experiencing some difficulty with another of the "conditions" it says is imposed on the waiver of sovereign immunity in 28 U.S.C. 2410 as a "protection" for the United States. Though on the surface it appears that the United States has an absolute right to remove a case brought in state court pursuant to 28 U.S.C. 2410 to federal court and have it heard there, that "right" or "condition" has lost its effectiveness to grant "protection" to the United States by the determination that the federal court has no jurisdiction on removed foreclosure or quiet title cases unless there is a separate basis for original jurisdiction in the federal court. *Wells* v. *Long*, 162 F.2d 842 (9th Cir.); *Jones* v. *United States*, 179 F. Supp. 456 (S.D. Calif.); *George* v. *United States*, 181 F. Supp. 522 (S.D. Tex.). Thus the "condition" that immunity to suit is waived only if the United States can remove the case to federal court is ineffective as a "protection" for the United States. "Conditions" then are not absolute. Private litigants have been permitted to proceed against the United States in state courts and the federal courts have not accepted the government's argument that if it cannot remove the cases to federal court it has not waived its immunity to suit. See the discussion in *George* v. *United States*, 181 F. Supp. 522 (S.D. Tex.). Therefore this Court should not accept the argument of the Government here that if the one year redemption right is not granted there has been no waiver of immunity and the foreclosure sale has been ineffectual to discharge the government encumbrance.

Local law determines the effects of the foreclosure sale. Local law applied here relieves the United States of its lien by its failure to bid at the sale.

IV.

The Laws of the State Are Supreme in Matters of Property Rights and Interests and Therefore the Kansas Redemption Statute Governs the Parties Here.

The law of the State in matters defining and establishing property interests and rights in property is supreme. *United States* v. *Bess*, 357 U.S. 51; *Central Surety and Ins. Corp.* v. *Martin Infante Co.*, 272 F.2d 231 (3d Cir.); *Matter of City of New York*, 5 N.Y.2d 300, 157 N.E.2d 587. If 28 U.S.C. 2410(c) was intended to have the implications the Government contends, then it was enacted beyond the bounds of Congressional authority. There is no constitutional authority for interference by Congress in property relationships within a state. This Court, in the landmark case of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78, said:

> "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."

and the Court continued:

> "'the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.'" *Id.* at 79.

Though the Court was there deciding what law should be applied by a federal court in a diversity action on a common law question, the Court nevertheless recognized that in matters of common law the state law is supreme. State statutory rules governing property rights have been held supreme. See *In re Karlinski's Estate*, 180 Misc. 44, 43 N.Y.S.2d 40; and Congress cannot exert control over individual property rights except in the proper exercise of

its constitutional powers. *Ginsberg* v. *Lindel*, 107 F.2d 721 (8th Cir.). This Court long ago held that matters of property law are left for state definition. In *United States* v. *Fox*, 94 U.S. 315, the Court ruled that:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer * * * is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated * * *. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State." *Id.* at 320-21.

Kansas, too, is a sovereign and is entitled, by virtue of never having relinquished the power, to define and regulate real property relationships within her bounds.

The terse statement in *Morgan* v. *Commissioner*, 309 U.S. 78, 80, that "State law creates legal interests and rights," is significant. More recently, in the language of Mr. Justice Harlan, in *United States* v. *Brosnan*, 363 U.S. 237, the Court said:

> "However, when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures * * *. We think it more harmonious with the tenets of our federal system and more consistent

with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule." *Id.* at 241-42.

The United States recognizes that it is "appropriate to look to state law" for the rules governing redemption except for the period of time when the redemption right can be exercised (Brief of Appellant, p. 31). Appellees urge that it not only is appropriate to look to state law but it is required, and we must look to *all* of the state laws governing property matters, not just some of them. Federal agencies holding second mortgages on Kansas real estate have been subjected to the Kansas redemption statutes many times in years past and, to our knowledge, without objection. In fact, counsel for the federal agencies have recognized the exclusive right of the mortgagor to redeem during the first twelve months after a judicial sale. See, *e. g.*, the motion for rehearing filed by the appellant, the Federal Farm Mortgage Corporation, in *Federal Land Bank* v. *Shoemaker*, 155 Kan. 501, 126 P.2d 205, where counsel for the government agency said that appellant was seeking the right of redemption given it by Kansas statute "which right of redemption would, of course, be subject to the owner's exclusive right during the first twelve months of the redemption period." (Motion for Rehearing, Case No. 35554 in the Supreme Court of the State of Kansas, p. 4, now retained in the Kansas State Library, Topeka, Kansas.) In that case the Federal Farm Mortgage Corporation, a second mortgagee, was joined as a defendant, cross-petitioned, and asked for a finding that it was entitled to a right of redemption. It was recognized, however, that the mortgagor had the exclusive right to

redeem for the first twelve months after the sale. To the same effect see *Federal Land Bank* v. *Ludwig*, 157 Kan. 657, 143 P.2d 784, in which, again, the Federal Farm Mortgage Corporation held a second mortgage on Kansas real estate, was joined as a defendant, cross-petitioned for foreclosure of its mortgage, and more than twelve months after the judicial sale sought to redeem. Counsel for the federal agency there recognized the validity of the Kansas statutes:

> "* * * the statute gives the defendant landowner an exclusive right to redeem the property at any time during the first twelve months following the sale by paying only the amount bid at the sale, with interest." (Abstract and Brief of Appellant in Case No. 35983 in the Supreme Court of the State of Kansas, p. 57, retained at the Kansas State Library, Topeka, Kansas.)

The applicability of Kansas statutes in matters of redemption has not heretofore been questioned.

A lien of the United States attaches only to such interest or right in property as the debtor holds at the time of the attachment of that lien. The interest or right in property of the debtor is defined by state law. *United States* v. *Bess*, 357 U.S. 51; *Commissioner* v. *Stern*, 357 U.S. 39; *Matter of City of New York*, 5 N.Y.2d 300, 157 N.E.2d 587; *Aetna Casualty and Surety Co.* v. *United States*, 4 N.Y.2d 639, 152 N.E.2d 225. The question here, then, is what interest the appellees had in the fee to which the mortgage lien attached in accordance with Kansas law.

This Court has recently again "rejected the contention that because a fee owned by a taxpayer was already encumbered by a lien which enjoyed seniority under state law, the Government's lien necessarily attached subject

to that lien." *United States* v. *Brosnan*, 363 U.S. at 241. We do not therefore argue that solely because of the prior *existence* of the first mortgage the government lien was subject to that mortgage. However, the factual background of this case clearly demonstrates that the government's lien attached subordinate to the encumbrance already on the property. It is not necessary to go to state law to reach that conclusion. The mortgage instrument itself provides that the government lien is subject to the mortgage of the John Hancock Mutual Life Insurance Co. Here then the question is what property interest the landowner retained to which the lien of the United States could attach under Kansas law.

The effects of the first mortgage and its foreclosure on junior encumbrances are matters to be determined by state law. See 28 U.S.C. 2410(c); cf. *United States* v. *Bess*, 357 U.S. 51. When the first mortgage attached, the landowner was left with certain rights and privileges pertaining to the land under state law. One of those rights was that in the event of a foreclosure sale on the first mortgage he would have eighteen months in which to redeem and during the first twelve of those months his right would be exclusive. *G.S. Kan., 1949,* 60-3439-40. The defendant mortgagor is precluded by statute in Kansas from waiving his right of redemption even if he chooses to do so. *G.S. Kan., 1949,* 60-3438. Therefore, when the United States took appellees' note and mortgage as security the exclusive redemption right had already attached to the mortgagors subject only to a foreclosure sale by the first mortgagee. There were, then, no redemption rights left to attach to the property after sale for the first twelve months for the United States. The language, "subject to mortgage in the amount of $25,000.00 in favor of The John Hancock Company" in the mortgage

instrument (R. 36) subjected the government's lien to the effects of that first mortgage as well as to the mortgage instrument itself. Since by the execution of the first mortgage to the insurance company, certain rights attached to the mortgagor and mortgagee, and since the right of redemption attaching to the mortgagor could not by legislative fiat of the State of Kansas be waived by him under any circumstances, the alleged right of the United States to redeem during the first twelve month period did not and could not attach as an effect of the foreclosure sale.

Perhaps in states having redemption statutes different from those of Kansas or in states where redemption rights do not exist at all, the right of the Government to redeem within one year from the foreclosure sale could have attached at the time the lien attached. But Kansas has given its landowners perhaps an unusual degree of protection. This the United States knew when it loaned money to Mr. and Mrs. Hetzel. See 39 Stat. 382, 12 U.S.C. 971. To these things the Government subjected itself when it loaned money with that knowledge and with the acknowledgment of the first mortgage.

The *Brosnan* case, decided in June, warrants additional consideration. The Court, analyzing the legislative history of 28 U.S.C. 2410(c), concluded that its purpose was to aid private lienors in removing encumbrances on property held by the United States. Certain protections were afforded the United States in the event suit was commenced pursuant to the waiver of sovereign immunity by the United States. Though Mr. Justice Harlan in writing for the Court stated that the Government is "guaranteed" a one year right to redeem if the plaintiff proceeds under section 2410, such language was not necessary to the holding in the case and must be considered *dicta.*

It was not the question at issue. Nevertheless, Kansas law "guarantees" a fifteen month period for redemption by the Government rather than just a twelve month period. The Government is therefore afforded the protection this Court has indicated Congress had in mind in enacting the statute. In reviewing all of the legislative history the Court said:

> "In any event, the basic question is not what the existing state of the law was, or even what Congress believed it to be, but whether Congress intended to exclude the application of all state procedures, whatever their existence or effectiveness might be. No such inference can be drawn from the legislative statements referred to." 363 U.S. at 250.

One cannot infer from the history that Congress intended that if "protection" otherwise existed application of the federal statute was to invalidate long existing state procedures. Certainly, if the Government can be divested of a lien pursuant to a state procedure which does not even require notice of sale to the Government, *United States* v. *Brosnan, supra,* it could be divested of an interest in land when, though it has notice, it fails to take the steps necessary to protect that interest in accordance with state procedures. This is not a case where the Government "will be left without any protection," *United States* v. *Brosnan, supra,* at 261, Clark, J., dissenting. And certainly if divestiture of junior government liens is permitted by a private foreclosure sale pursuant to terms of a mortgage unknown to the Government, *United States* v. *Cless,* 254 F.2d 590 (3d Cir.), a judicial sale pursuant to state law giving the United States more "protection" than 28 U.S.C. 2410(c) provides, should certainly divest the United States of its lien.

Language from the *Cless* case relied upon heavily by the Supreme Court of Kansas in this case is persuasive. The Third Circuit said:

> "We find nothing in the statute [28 U.S.C. 2410] giving the United States rights in this matter superior to the rights enjoyed by private citizens. The statute accords to the government no such preference.
>
> * * *
>
> "In the absence of express Congressional action to the contrary, we think it is not asking too much from a federal agency, which has embarked upon the business of lending money in competition with private firms and individuals, simply to be governed by the same local law which controls the rights of private citizens in a similar endeavor. And the government could not have been taken by surprise by local law established for one hundred years or more. In this situation, notice adequate to others is adequate to the United States." *Id.* at 593-94.

Since no intention to give the United States superior rights has been expressed by Congress the validity of Kansas procedures should be recognized.

CONCLUSION

Since the United States waived any condition on its appearance in the Kansas court and since Kansas law should be applied to determine the rights of mortgagees in Kansas real property, the decision of the Supreme Court of Kansas is correct. That judgment should therefore be affirmed, or in the alternative, if after an analysis of the unique factual background the Court should find there is

no substantial question involved, the appeal should be dismissed.

Respectfully submitted,

Emmet A. Blaes,
Harry L. Hobson,
500 Farmers & Bankers Life Bldg.,
Wichita, Kansas,
Attorneys for Appellees.

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